

STATE OF CALIFORNIA
FISH AND GAME COMMISSION
INITIAL STATEMENT OF REASONS FOR REGULATORY ACTION
(Pre-publication of Notice Statement)

Amend Section 670.2
Title 14, California Code of Regulations
Re: Plants of California Declared to Be Endangered, Threatened or Rare

- I. Date of Initial Statement of Reasons: December 28, 2005
- II. Dates and Locations of Scheduled Hearings:
 - (a) Notice Hearing: Date: February 2, 2006
Location: Sacramento, California
 - (b) Adoption Hearing: Date: April 7, 2006
Location: Monterey, California
- III. Description of Regulatory Action:
 - (a) Statement of Specific Purpose of Regulation Change and Factual Basis for Determining that Regulation Change is Reasonably Necessary:

Section 670.2 of Title 14, CCR, provides a list, established by the Fish and Game Commission (Commission), of plants designated as endangered, threatened or rare in California. The Commission has the authority to add or remove species from this list if it finds that the action is warranted.

The known worldwide distribution Baker's larkspur (*Delphinium bakeri*) is limited to one population on the Petaluma-Marshall Road in Marin County, California. The population occupies less than one acre. Historically, this species was known from the Coleman Valley in Sonoma County and from Tomales in Marin County. The numbers of individual plants counted along the Petaluma-Marshall Road ranged from one in 1982 to 97 individuals in 2003. The plants were twice cut to the ground by road crews, most recently in 2002. The population burned during a wildfire in October 2004 and the slope on which the population grew was excavated to bedrock in October 2004 by crews cleaning culverts along the road. Nine plants survived the fire and scraping. No information is available on the population size of these two historic sites. Baker's larkspur is at high risk of extinction due to the small number of plants and the limited extent of available habitat. Although this species is currently listed as rare, the protection of the California Endangered Species Act (CESA) is necessary to prevent the further decline and potential extinction of this species of plant.

At its August 18, 2005 meeting, the Commission designated this plant a candidate for listing and a Notice was prepared and filed with the Office of Administrative Law. The Department of Fish and Game (Department) has evaluated this species relative to the proposed listing as endangered. Based on the level and degree of present and potential threats to this species, the

Department finds that the petitioned action is warranted and recommends that Baker's larkspur be listed as endangered.

(b) Authority and Reference Sections from Fish and Game Code for Regulation:

Authority: Sections 1904 and 2070, Fish and Game Code.

Reference: Sections 1755, 1904, 2062, 2067, 2070, 2072.7, and 2075.5, Fish and Game Code.

(c) Specific Technology or Equipment Required by Regulatory Change:

None.

(d) Identification of Reports or Documents Supporting Regulation Change:

Petition to list Baker's larkspur as endangered (Department of Fish and Game, May, 13, 2005). Report to the Fish and Game Commission on the status of Baker's larkspur.

(e) Public Discussions of Proposed Regulations Prior to Notice publication:

No public meetings are being held prior to the notice publication. The 45-day comment period provides adequate time for review of the proposed amendments.

IV. Description of Reasonable Alternatives to Regulatory Action:

(a) Alternatives to Regulation Change:

List as Threatened:

Baker's larkspur is known only from one population worldwide, in Marin County, California. The total occupied area is less than one acre. The population is threatened by habitat modification and destruction, other human-related activities, and competition with non-native, invasive species. In addition, due to the small number of plants and small area of occupied habitat, the species is highly vulnerable to chance events. Because of the small population sizes and the level and degree of threat to the species, the Department finds that the species is in imminent danger of extinction. This high level of threat meets the criteria for endangered rather than threatened status. The Department therefore finds that listing as threatened would not be the appropriate designation at this time.

(b) No Change Alternative:

Baker's larkspur is currently listed as a rare species under the Native Plant Protection Act (NPPA) (Section 1900 *et seq.* Fish and Game Code). The rare listing affords protection under CEQA and the NPPA, except for provisions specified in the NPPA. Protection under CEQA for state-listed rare species is generally equivalent to that for threatened and endangered species with respect to the requirement for mitigation of adverse impacts; however, state-listed rare species are not afforded the additional legal protection under CESA available to

threatened or endangered species.

The known sole population of Baker's larkspur occurs on private land on a road cut that is not managed to benefit the species. This population has been impacted by roadside maintenance and ditch excavation, and by fire. Non-native plants have invaded Baker's larkspur habitat in the aftermath of the October 2004 wildfire. Negative impacts to Baker's larkspur as a result of road maintenance activities and ditch maintenance have continued despite of the state-listed rare status of this plant.

The Department does not believe that rare is an appropriate listing category due to the level of threat to this species. Failure to officially recognize Baker's larkspur as endangered will deprive this plant of adequate consideration under CESA. Without such recognition, Baker's larkspur is at increased risk for decline or extinction in California. The Department is fulfilling its statutory obligation in making this proposal (Sections 2055, 2073.5 and 2074.6, Fish and Game Code).

(c) Consideration of Alternatives:

In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purposes for which the regulation is proposed or would be as effective as and less burdensome to the affected private persons than the proposed regulation.

V. Mitigation Measures Required by Regulatory Action:

The proposed regulatory action will have no negative impact on the environment; therefore, no mitigation measures are needed.

VI. Impact of Regulatory Action:

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

(a) Significant Statewide Adverse Economic Impact Directly Affecting Businesses, Including the Ability of California Businesses to Compete with Businesses in Other States:

The proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states because the species is restricted to an area of less than one acre in Marin County, California.

Although the statutes of the California Endangered Species Act (CESA) do not specifically prohibit the consideration of economic impact in determining if listing is warranted, the Attorney General's Office has consistently advised the Commission that it should not consider economic impact in making a finding on listing. This is founded in the concept that CESA was drafted in the image of the

federal Endangered Species Act. The federal act specifically prohibits consideration of economic impact during the listing process.

CESA is basically a two-stage process. During the first stage, the Commission must make a finding on whether or not the petitioned action is warranted. By statute, once the Commission has made a finding that the petitioned action is warranted, it must initiate a rulemaking process to make a corresponding regulatory change. To accomplish this second stage, the Commission follows the statutes of the Administrative Procedure Act (APA).

The provisions of the APA, specifically sections 11346.3 and 11346.5 of the Government Code, require an analysis of the economic impact of the proposed regulatory action. While Section 11346.3 requires an analysis of economic impact on businesses and private persons, it also contains a subdivision (a) which provides that agencies shall satisfy economic assessment requirements only to the extent that the requirements do not conflict with other state laws. In this regard, the provisions of CESA leading to a finding are in apparent conflict with Section 11346.3, which is activated by the rulemaking component of CESA.

Since the finding portion of CESA is silent to consideration of economic impact, it is possible that subdivision (a) of Section 11346.3 does not exclude the requirement for economic impact analysis. While the Commission does not believe this is the case, an abbreviated analysis of the likely economic impact of the proposed regulation change on businesses and private individuals is provided. The intent of this analysis is to provide disclosure, the basic premise of the APA process. The Commission believes that this analysis fully meets the intent and language of both statutory programs.

Designation of Baker's larkspur as endangered will subject it to the provisions of CESA. This act prohibits take and possession except as may be permitted by the Department, the Native Plant Protection Act, or in the California Desert Native Plants Act.

Endangered status is not expected to result in any significant adverse economic effect on small business or significant cost to private persons or entities undertaking activities subject to CEQA. CEQA requires local governments and private applicants undertaking projects subject to CEQA to consider *de facto* endangered (or threatened) species to be subject to the same requirements under CEQA as though they were already listed by the Commission in Section 670.2 (CEQA Guidelines, Section 15380). Based on its rarity, Baker's larkspur would qualify for this protection under CEQA.

Required mitigation as a result of lead agency actions under CEQA, whether or not a taxon is listed by the Commission, may increase the cost of a project. Such costs may include, but are not limited to, purchase of off-site habitat, development and implementation of management plans, establishment of new populations, installation of protective devices such as fencing, protection of additional habitat, and long-term monitoring of mitigation sites. If the mitigation measures required by CEQA lead agency do not minimize and fully mitigate to the standards of CESA, listing could increase business costs by requiring measures beyond those required by CEQA.

- (b) Impact on the Creation or Elimination of Jobs Within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California:

None.

- (c) Cost Impacts on a Representative Private Person or Business:

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. Designation of threatened or endangered status, *per se*, would not necessarily result in any significant cost to private persons or businesses undertaking activities subject to CEQA. CEQA presently requires applicants undertaking projects subject to CEQA to consider *de facto* endangered (or threatened) and rare species to be subject to the same protections under CEQA as though they are already listed by the Commission in Section 670.2 or 670.5 of Title 14, CCR (CEQA Guidelines Section 15380). Based on its rarity, Baker's larkspur would qualify for this protection under CEQA.

- (d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

None.

- (e) Nondiscretionary Costs/Savings to Local Agencies:

None.

- (f) Programs mandated on Local Agencies or School Districts:

None.

- (g) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4:

None.

- (h) Effect on Housing Costs:

None.

Informative Digest/Policy Statement Overview

State law (Section 1904, Fish and Game Code) specifies that the Fish and Game Commission (Commission) may, after public hearing, designate endangered and rare plants. State law (Section 2070, Fish and Game Code) also specifies that the Commission shall establish a list of endangered species and a list of threatened species. Section 2070 further states that the Commission shall add or remove species from either list if it finds, upon the receipt of sufficient scientific information, that the action is warranted.

On June 24, 2005, the Commission received a petition to uplist Baker's larkspur from rare to threatened species status. Pursuant to the provisions of Section 2074.2 of the Fish and Game Code, the Commission, at its August 18, 2005 meeting, accepted the petition for consideration and made a finding that the petitioned action may be warranted. Pursuant to the provisions of Section 2075.5 of the Fish and Game Code, the Commission, at its February 3, 2006, meeting in Sacramento, made a finding that the petitioned action to uplist the Baker's larkspur (*Delphinium bakeri*) from rare to endangered is warranted.

The Department of Fish and Game proposes to amend Section 670.2 of Title 14, CCR, to add Baker's larkspur (*Delphinium bakeri*) to the list of endangered plants (subsection (a)). Concurrently, the Department proposes to delete Baker's larkspur from the list of rare plants (subsection (c)). This proposal is based upon the documentation of population declines and threats to the habitat of this species to the point that it meets the criteria for listing as endangered by the Commission as set forth in the California Endangered Species Act (CESA). The Department is fulfilling its statutory obligation in making this proposal which, if adopted, would afford this species the recognition and protection available to it under CESA. Baker's larkspur is extremely rare and is restricted to one known population on private land in Marin County, California. Total occupied habitat is less than one acre.